STATE OF MICHIGAN

IN THE SUPREME COURT

DONALD E. TATE,

Plaintiff-Appellee,

-vs-

BOTSFORD GENERAL HOSPITAL,
~~a Michigan Non-Profit Corporation~~,

Defendant-Appellant,
_____/

Supreme Court No.

Court of Appeals No. 245081

Oakland County Circuit Court
Case No. 01-035359-NO

126603

NOTICE OF HEARING

DEFENDANT-APPELLANT BOTSFORD GENERAL HOSPITAL'S APPLICATION FOR LEAVE TO APPEAL

JUNE 10, 2004 ORDER OF THE COURT OF APPEALS DENYING MOTION FOR RECONSIDERATION

APRIL 29, 2004 UNPUBLISHED OPINION OF THE COURT OF APPEALS

25944

OCTOBER 31, 2002 ORDER OF OAKLAND COUNTY CIRCUIT COURT DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

OCTOBER 9, 2002 OPINION AND ORDER OF OAKLAND COUNTY CIRCUIT GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

NOTICE OF FILING OF DEFENDANT'S-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBITS (BOUND SEPARATELY)

AFFIDAVIT OF SERVICE

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APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM/GROUNDS FOR RELIEF/RELIEF SOUGHT

Defendant Botsford General Hospital seeks leave to appeal from the June 10, 2004 order of the Court of Appeals denying reconsideration and the Court's April 29, 2004 unpublished per curiam opinion (Jessica R. Cooper, P.J., and Richard Allen Griffin and Stephen L. Borrello, JJ) reversing the Oakland County Circuit Court Judge's October 9, 2002 opinion and order granting defendant's motion for summary disposition.

In this false imprisonment case, defendant filed a motion for summary disposition on September 18, 2002 on the basis that the alleged restraint was not "false" as defendant was under a duty to administer necessary treatment to preserve plaintiff's life, including the use of soft wrist restraints. Plaintiff had presented for treatment of nausea and an upset stomach at defendant's emergency room. Plaintiff developed a severe allergic reaction to medication administered to treat his symptoms, which then developed into a life-threatening condition. Plaintiff suffered a reaction which caused a drop in his respiration, compromised his alertness and competency, and resulted in a dystonic reaction (involuntary muscle movements). Plaintiff was intubated to preserve his airway and briefly placed in soft writs restraints to prevent extubation during his dystonia.

The trial court granted summary disposition, finding that no false imprisonment occurred because plaintiff developed an emergency condition which was life-threatening. The trial court found that, under such circumstances, consent for treatment is presumed and treatment by a physician is mandated. A motion for reconsideration was also denied by the trial court by order entered on October 31, 2002.

On November 16, 2002, plaintiff filed a claim of appeal with the Court of Appeals. After briefing and oral argument, the Court of Appeals, in an unpublished per curiam opinion, on April 29, 2004, reversed the grant of summary disposition to defendant, finding that a question of fact exists regarding whether plaintiff was competent to refuse treatment. Subsequently, defendant timely filed a motion for reconsideration, which was denied by order of the Court of Appeals on June 10, 2004.

The Court of Appeals improperly found a question of fact as to whether plaintiff was competent to refuse treatment. The only admissible evidence presented on this issue was the affidavit of the treating physician and plaintiff's medical records which detailed the medical emergency requiring treatment. Such necessary treatment resulted in a compromise of plaintiff's alertness and metal competency. Defendant also submits that the Court of Appeals, in reversing the trial court, improperly relied on unsworn typewritten statements purportedly from plaintiff and his friend stating that no medical emergency existed. Defendant submits that such a ruling is directly contrary to decisions of this Court holding that a party opposing summary disposition must submit admissible evidence to counter the evidence presented by the moving party. Defendant submits that the Court of Appeals decision is clearly erroneous and will result in material injustice if not reversed.

Defendant respectfully requests that this Honorable Court peremptorily reverse the opinion of the Court of Appeals and reinstate the trial court's grant of summary disposition. In the alternative, defendant requests that this Court grant the application and hear the matter on the merits.

JURISDICTIONAL STATEMENT

Defendant's motion for rehearing was timely filed within 21 days of the Court of Appeals' opinion issued on April 29, 2004. The Court of Appeals issued its order denying the motion for rehearing on June 10, 2004. Defendant has filed this application within 42 days of the order denying the motion for rehearing. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(a).

STATEMENT OF QUESTION PRESENTED

Whether summary disposition was properly granted by the trial court in this false imprisonment claim where evidence presented by defendant established that plaintiff's alertness and mental competency were compromised by a medical emergency and plaintiff presented no admissible evidence to create a question of fact?

Plaintiff argues the answer is "No."

Defendant submits the answer is "Yes."

The trial court held the answer is "Yes."

The Court of Appeals held the answer is "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-appellant, Botsford General Hospital, seeks leave to appeal from the June 10, 2004 Court of Appeals' order denying defendant's motion for rehearing and the April 29, 2004 unpublished per curiam opinion of the Court of Appeals (Jessica R. Cooper, P.J., and Richard Allen Griffin and Stephen L. Borrello, JJ) reversing the trial court's order of summary disposition. On October 9, 2002, Oakland County Circuit Judge Colleen A. O'Brien granted defendant's motion for summary disposition of this false imprisonment claim. A motion for reconsideration was denied by opinion and order entered on October 31, 2002.

Defendant sought and was granted dismissal of plaintiff's claims on the basis that no false imprisonment occurred where defendant had a right and a duty to administer appropriate treatment, including the use of soft wrist restraints, when plaintiff suffered a severe reaction to medication which placed plaintiff in danger of respiratory arrest, a life-threatening emergency condition. Plaintiff's reaction to this medication also compromised his mental alertness and competency. Under such condition, the hospital had no option but to provide the treatment necessary to preserve plaintiff's life. Defendant submits that the trial court properly dismissed plaintiff's false imprisonment action. Plaintiff failed to submit any admissible evidence to rebut the evidence that a medical emergency developed, that the medical emergency compromised plaintiff's alertness, mental competency and ability to refuse treatment, and that emergency treatment was necessary to preserve plaintiff's life.

Factual Background

Plaintiff sought treatment at Botsford Hospital's emergency room in the early morning hours of January 18, 2001 with complaints of an upset stomach and nausea (see Exhibit 1-A).[1] The "Emergency Department Continuing Care Record" notes that Compazine was given intravenously

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[1] Plaintiff's entire medical record was attached to defendant's motion for summary disposition filed with the trial court and is attached as Exhibit 1-A to this application. For the convenience of the Court, the relevant portions of the medical record have also been attached as separate exhibits.

to plaintiff at 3:50 a.m. to treat plaintiff's upset stomach and nausea (see Exhibit 5). Almost immediately after the Compazine was administered, at 3:55 a.m., plaintiff's respiration became labored (Exhibit 5, p 1). At 4:00 a.m., the plaintiff became very agitated and stated that he was leaving (Exhibit 5, p 1). At 4:05 a.m., plaintiff was administered Benadryl and at 4:13 a.m., plaintiff was administered Ativan (Exhibit 5, p 2). At 4:30 a.m., plaintiff was "very slow to respond to loud verbal stimuli" (Exhibit 5, p 2). The order for restraint, which plaintiff claims caused the false imprisonment, was signed at 4:30 a.m. and was instituted at 5:00 a.m. for safety purposes to prevent plaintiff from extubating himself (Exhibit 5, p 2). Such occurred after plaintiff's adverse reaction to medication and after his alertness and competency were compromised. The restraint was terminated at 7:15 a.m. (see Exhibit 6, restraint flow sheet).

In his complaint, plaintiff alleges that after his blood pressure was taken, after a blood sample was taken and after an IV was started in his arm, plaintiff concluded that he wished to go to Beaumont Hospital for further treatment and attempted to leave the hospital (see Exhibit 1-C, complaint, ¶¶5, 6). The complaint states that plaintiff was then advised by the attending doctor that he was not well enough to leave the hospital (Exhibit 1-C, ¶6). When plaintiff persisted in his attempt to leave the hospital, the complaint alleges that he was placed in restraints and was from that point until his release the next day, falsely imprisoned in defendant's facility (Exhibit 1-C, ¶7, 8).[2]

Motion for Summary Disposition

Defendant filed a motion for summary disposition on or about September 18, 2002 seeking dismissal of plaintiff's false imprisonment action (see Exhibit 1, defendant's motion for summary disposition). Defendant submitted that the complaint should be dismissed as plaintiff failed to establish that his alleged restraint was false, since the treating emergency department physician had

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[2] It should be specifically noted that plaintiff has filed this action claiming damages based only on the alleged false imprisonment. Plaintiff's complaint does not state a claim for medical malpractice. Further, any complaint allegations which might be construed as alleging negligence or as a criticism of the medical care and treatment rendered to plaintiff are not supported by an affidavit of merit, as required by MCL 600.2912d (see Exhibit 1-C).

a right and a duty to provide care in an emergency situation (Exhibit 1, p 7). Specifically, defendant argued that plaintiff developed a severe allergic reaction to the medication Compazine, administered upon plaintiff's admission to defendant's emergency department to treat his nausea (Exhibit 1, p 5). Plaintiff's reaction was characterized by agitation and a dystonic reaction (involuntary loss of muscle control resulting in distorted twisting or movement of part or all of the body) (Exhibit 1, p 5). In response to this allergic reaction, plaintiff was treated with the medications Benadryl and Ativan, in response to which his respiration dropped and he became "quite obtundent" (Exhibit 1, p 5). As plaintiff was then in danger of respiratory arrest (and thus, possibly death), he was intubated and placed in soft wrist restraints to prevent him from removing the nasal tube due to his dystonic reaction (Exhibit 1, p 5).

In support of the motion for summary disposition, defendant submitted the affidavit of Diane Paratore, D.O., the board certified emergency medicine physician who attended to plaintiff at defendant hospital (see affidavit attached as Exhibit 2).[3] Dr. Paratore confirmed that plaintiff's reaction to the Compazine and the medications used to treat the reaction, characterized by agitation, dystonia and a drop in his respiration rate, developed into an emergent life-threatening condition which required immediate care and treatment (Exhibit 2, ¶¶5, 7, 11). Further, the reaction rendered plaintiff insufficiently alert or competent to refuse treatment (Exhibit 2, ¶11). Dr. Paratore stated that plaintiff was intubated to protect his airway in the event of respiratory arrest and that plaintiff was placed in soft wrist restraints to prevent him from removing the tube as a result of his dystonic reaction, which could cause injury to and jeopardize his airway (Exhibit 2, ¶9).

In further support of the motion for summary disposition, defendant submitted with the motion plaintiff's entire medical record which detailed the development of plaintiff's life-threatening medical emergency. The records document that the Compazine was given intravenously and that

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[3] Defendant's motion for summary disposition was filed on or about September 18, 2002 with an unsigned affidavit (see Exhibit 1-D). The same affidavit was signed by Dr. Paratore and notarized on September 20, 2002 (see Exhibit 2). The signed affidavit was filed with the trial court on October 9, 2002.

plaintiff's reaction to this medication began almost immediately after it was administered (Exhibit 5).

In response to this motion, plaintiff simply denied that he believed any medical emergency existed (see plaintiff's response, ¶6).[4] Plaintiff submitted only unsworn statements purportedly signed by himself and his friend, Lillian Hoblak, to support his contention that no medical emergency existed (see statements attached to plaintiff's response).[5]

Trial Court Hearing and Decision

A hearing on defendant's motion was held on October 9, 2002 (see 10/9/02 transcript attached as Exhibit 7). The trial court took the matter under advisement and subsequently issued a written opinion and order granting summary disposition to defendant and dismissing plaintiff's complaint (10/9/02 opinion and order, p 4). The trial court found that Dr. Paratore's affidavit established that plaintiff developed an emergency condition which was life-threatening and that under such circumstances, consent is presumed and treatment by a physician is mandated (10/9/02 opinion and order, p 4). By order dated October 31, 2002, the trial court also denied plaintiff's motion for reconsideration, filed on October 29, 2002, on the basis that the motion merely presented the same issues previously ruled on by the court and that plaintiff had failed to demonstrate a palpable error by which the court and the parties were misled (see 10/31/02 opinion and order).

Court of Appeals Proceedings

Plaintiff filed a claim of appeal on or about November 16, 2002. After briefing and oral argument, on April 29, 2004, in an unpublished per curiam opinion, the Court reversed the trial

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[4] Plaintiff's response was filed on October 9, 2002, the date scheduled for hearing in this matter. Defendant did not receive a copy of the response until after the hearing and was thus precluded from reviewing plaintiff's response prior to the hearing and/or filing a written reply (see Exhibit 7, p 4).

[5] Plaintiff refers to his and Ms. Hoblak's written statements respectively as an "affidavit" and a "deposition." However, neither statement contains any indication that the contents were sworn to before a notary public or other official authorized to administer oaths (see statements attached to plaintiff's response).

court's orders and remanded the case for further proceedings (see 04/29/04 opinion). The Court found that a question of fact was presented "regarding whether plaintiff was competent to refuse treatment" (slip op at p 3).

On May 18, 2004, defendant timely filed a motion for rehearing in the Court of Appeals. Defendant submitted that no question of fact was presented where plaintiff had not provided the trial court with any admissible evidence to counter the evidence presented by defendant. Plaintiff's medical records and Dr. Paratore's affidavit established that the treating physicians believed that a plaintiff's severe allergic reaction to medication developed into a life-threatening medical emergency which required immediate treatment. The same evidence established that the physicians believed that plaintiff's reaction had compromised his alertness and competency, rendering him unable to refuse treatment. Defendant submitted that the Court of Appeals improperly relied on unsworn typewritten statements, the only material submitted by plaintiff to the trial court with his response to the motion for summary disposition, to find that a question of fact existed. Such evidence is hearsay and inadmissible. Thus, plaintiff, in essence, provided no evidence to counter defendant's motion for summary disposition. The Court of Appeals denied the motion for rehearing by order dated June 10, 2004 (see 06/10/04 order).

ARGUMENT

Summary disposition was properly granted as to plaintiff's false imprisonment claim where the use of soft wrist restraints was a necessary and appropriate component of life saving treatment administered to plaintiff in a medical emergency and plaintiff was not sufficiently competent to refuse such treatment.

In this case, plaintiff's false imprisonment claim was properly dismissed by the trial court. The unrebutted evidence established that a life-threatening emergency developed which compromised plaintiff's alertness and competency and then required immediate treatment, including the brief use of soft wrist restraints. Defendant established that plaintiff suffered a rare but recognized adverse reaction to the medication Compazine, which had been administered intravenously to treat his complaints of nausea. Plaintiff's reaction was characterized by dystonia (involuntary muscle movements and spasms). Plaintiff's treating physician specifically stated in an affidavit that she believed plaintiff's dsytonic reaction rendered him insufficiently alert or competent to refuse treatment. To counter the dystonic reaction, plaintiff was administered Benadryl and Ativan, which then caused his respiration to drop and presented a danger of respiratory arrest. A nasal tube was then inserted to protect plaintiff's airway. It was only at this point that the brief use of restraints became necessary to prevent plaintiff from extubating himself during his dystonic reaction. Soft wrist restraints were initiated at 5:00 a.m. and terminated at 7:15 a.m., when the nasal tube was removed.

Despite the evidence submitted by defendant chronicling the emergency situation which compromised plaintiff's competency, as well as need for life-saving treatment, plaintiff failed to present any expert testimony or admissible evidence to create a question of fact. Plaintiff's responded to defendant's motion only with unsworn statements which simply state that no medical emergency existed. The Court of Appeals relied entirely on these unsworn statements to erroneously conclude that a question of fact existed regarding whether plaintiff was competent to refuse treatment. These statements are inadmissible and insufficient to create a question of fact. The trial court properly granted summary disposition in this case.

A. Standard of review.

A trial court's decision on a motion for summary disposition is reviewed de novo by this Court. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. Id. This Court in Smith v Globe Life Ins Co, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting from Quinto v Cross & Peters Co, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the standards to apply in reviewing a motion brought pursuant to MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

B. No false imprisonment occurred where defendant established that a life threatening emergency existed which compromised plaintiff's alertness and competency and required immediate care and treatment.

In Michigan, false imprisonment is defined as an intentional tort, the elements of which are:

1. Restraint of a person's liberty or freedom of movement.

2. The restraint must be "false", that is, without right or authority to do so.

See Tumbarella v The Kroger Co, 85 Mich App 482, 489; 271 NW2d 284 (1978).

In the instant case, defendant submitted that no false imprisonment could occur where the

treating physician believed that a life-threatening medical emergency existed, that plaintiff's alertness and mental competency had been compromised, and that treatment was necessary to preserve plaintiff's life.

The diagnosis of a medical emergency, the treatment necessary to counteract such medical emergency, as well as assessment of a patient's competency, are all, by definition, exercises of professional judgment. Defendant established, through the affidavit of Dr. Paratore and supporting medical records, that a medical emergency existed and that the use of restraints was necessary to treat the emergency. The same evidence established that plaintiff's alertness and competency were compromised during his reaction to the Compazine medication. Plaintiff has not rebutted defendant's evidence with any expert testimony, despite apparently recognizing that expert testimony would be necessary to support his claim, as evidenced by his initial intention to call a purported medical expert to testify as to these issues.

1. Dr. Paratore's expert testimony establishes that plaintiff was in danger of respiratory arrest and that the use of soft wrist restraints was necessary to preserve plaintiff's life.

Upon plaintiff's admission to defendant hospital, he was attended by Diane Paratore, D.O. In support of the motion for summary disposition, defendant submitted a sworn affidavit from Dr. Paratore (as well as plaintiff's medical records) which established that, due to plaintiff's allergic reaction to Compazine and the treatment administered to counter the reaction, plaintiff was in very real danger of respiratory arrest and death (Exhibit 2, ¶¶5-8). Dr. Paratore further testified in her affidavit that the medication caused plaintiff to become agitated and dystonic (defined as involuntary muscle movements) (Exhibit 2, ¶5). In addition, Dr. Paratore stated that a drop in plaintiff's respiration was observed (Exhibit 2, ¶7). Dr. Paratore testified that plaintiff was then intubated to protect his airway in the event of a respiratory arrest and that, due to his dystonic reaction, per protocol, soft wrist restraints were applied to prevent plaintiff from extubating himself, which would have injured and jeopardized his airway (Exhibit 2, ¶¶8, 9). Further, Dr. Paratore's testimony established that plaintiff's mental alertness and competency were compromised by his reaction to

the medication.

> Because of the Compazine reaction and the reaction to the treatment thereof, Mr. Tate developed an emergent condition which was life-threatening and mandated immediate care and treatment. Because of the dystonic reaction, Mr. Tate would not have been sufficiently alert or sufficiently mentally competent to refuse treatment. [Exhibit 2, ¶11.]

Thus, Dr. Paratore's expert testimony established that a life-threatening medical emergency developed, that the use of restraints was medically necessary to preserve plaintiff's life, and that plaintiff's competency was compromised by his condition.

2. Plaintiff's medical records confirm Dr. Paratore's testimony.

The developments described by Dr. Paratore in her affidavit are confirmed by plaintiff's medical records, which were also submitted to the trial court with the motion for summary disposition. Plaintiff's was administered Compazine intravenously at 3:50 a.m. to treat his nausea and almost immediately suffered an adverse reaction involving dystonic movements. It is this adverse reaction which Dr. Paratore states created an emergency condition and also rendered plaintiff insufficiently alert or competent to refuse the life-saving treatment necessary to counter this reaction.

The Court of Appeals, in its opinion, did not appear to understand or appreciate the fact that it was the Compazine reaction which compromised plaintiff's alertness and competency. The Compazine was administered to plaintiff to treat the condition for which he came to the emergency room. There is no dispute that the Compazine was administered voluntarily and while plaintiff was alert and competent. Even plaintiff concedes in his complaint that his request to leave the hospital was voiced after the IV (which delivered the Compazine) was started (Exhibit 1-C, complaint, ¶¶5, 6). After the Compazine was administered and plaintiff was in the midst of a severe allergic reaction, which the treating physician believed compromised plaintiff's competency and developed into a life-threatening condition, the hospital administered the treatment necessary to save plaintiff's life. Such treatment included the administration of Benadryl and Ativan, which caused a drop in respiration and danger of respiratory arrest.

Under such circumstances, no false imprisonment could occur. Given the emergency situation that developed, and given that plaintiff's competency and alertness was compromised during the emergency situation, defendant was required to administer life-saving treatment, including the brief use of restraints, as such was necessary to prevent plaintiff from accidentally removing the nasal tube during his dystonia.

3. Plaintiff submitted no evidence sufficient to counter the evidence of a life-threatening medical emergency which compromised plaintiff's alertness and competency.

The use of restraints, the existence of a medical emergency and the resulting effect on a patient's mental competency are all issues which involve the exercise of professional judgment. Thus, to support his claim that the use of restraints was improper, that no medical emergency existed, and/or that his competency had not been compromised, plaintiff is required to submit expert testimony. Yet, plaintiff has submitted no expert testimony to contradict Dr. Paratore's affidavit testimony and the documentation contained in plaintiff's medical records.

a. Plaintiff is required to present expert testimony that the use of restraints was improper despite styling his complaint as an action for "false imprisonment."

It is well settled that the use and adequacy of restraints in a hospital setting is an issue involving the exercise of professional judgment. Thus, plaintiff is required to present expert testimony to support his claim that the use of restraints in the instant case was improper. In Starr v Providence Hospital, 109 Mich App 762; 312 NW2d 152 (1981), the plaintiff was admitted to the defendant hospital for surgery. During her stay, an elderly and confused male patient attempted to climb into her bed. The plaintiff alleged that she suffered severe psychological injury as a result. After a jury verdict of no cause of action in favor of the defendant, the plaintiff appealed alleging, in part, that the trial court erred in instructing the jury using a professional negligence standard. The plaintiff argued that the use and extent of the type of restraints that should have been used on the elderly patient to prevent him from climbing into her bed was a matter of ordinary negligence. This

Court disagreed and held that the use of restraints involved "professional judgments which are beyond the common knowledge and experience of laymen to judge." Id. at 766. Without expert testimony, the jury would be left to speculate as to when the use of restraints is appropriate or necessary.

> **The type of restraints to be employed and the use thereof also involve professional judgment.** As noted during the trial, several different types of restraints are available, some of which are so severe that they may be used only when authorized by a physician. In addition, the physical condition of the patient to be restrained must also be taken into consideration. Where the restrained patient is ill, as in this case, the use of an improper restraint could be detrimental to his health. [Id. at 766, emphasis supplied.]

The concept that the use of restraints involves an exercise of professional judgment is also reflected in the language of the statutory provisions applicable to health care facilities. In pertinent part, the statutes allow for the use of restraints on a patient only with the involvement of the attending physician.

> A patient or resident is entitled to be free from . . . physical and chemical restraints, except those restraints authorized in writing by the attending physician for a specified and limited time or **as are necessitated by an emergency to protect the patient or resident from injury to self or others**, in which case the restraint may only be applied by a qualified professional who shall set forth in writing the circumstances requiring the use of restraints and who shall promptly report the action to the attending physician. [MCL 333.20201(l), emphasis supplied.]

The instant case does not present an issue of medical malpractice. Nevertheless, this case does involve a question of whether the use of restraints was necessary and/or proper as well as whether plaintiff was competent to refuse such treatment. Such is an exercise of professional judgment. Defendant has presented expert testimony through the affidavit of Dr. Paratore that restraints were medically necessary to prevent plaintiff from injuring himself. Dr. Paratore testified that, due to plaintiff's dystonia, there was a very real danger that he would extubate himself, thereby injuring and jeopardizing his airway. Dr. Paratore stated that plaintiff's dystonic reaction rendered him insufficiently alert or competent to refuse treatment. The trial court correctly concluded that the use of restraints was necessary and proper under the circumstances, thus, the restraint could not be

"false."

As the use of restraints, by definition, involves an exercise of professional judgment, plaintiff's personal statements and/or that of his friend, both consisting solely of lay opinions, are insufficient to create an issue of fact. Plaintiff has presented no expert testimony to counter the testimony of defendant's expert witness that restraints were appropriate and indeed mandated by plaintiff's condition. Despite styling his complaint as the intentional tort of false imprisonment, plaintiff's claim at its heart involves a question of whether the restraints applied to plaintiff (resulting in the alleged false imprisonment) were necessary and proper. As plaintiff has not supplied expert testimony to support his allegation that the use of restraints was improper or unnecessary, he has failed to counter defendant's evidence on this issue and his complaint was properly dismissed.

b. Plaintiff is required to present expert testimony to support his claim that no medical emergency existed as such also involves the exercise of professional judgment.

Likewise, the diagnosis of an idiosyncratic allergic reaction to medication[6], which develops into a life threatening medical emergency requiring immediate treatment and whether such reaction has affected a person's competency and/or alertness, involves an exercise of professional judgment for which expert testimony is also required. MRE 702 allows for the admission of expert testimony where "recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." However, where the common knowledge of a lay person would be insufficient to determine a fact in issue, as in the analogous context of a medical malpractice action, expert testimony may be required. This is so because the ordinary lay person cannot judge the skill and competence of a physician. As this Court stated in Lince v Monson, 363 Mich 135; 108 NW2d 845 (1961), where a physician's professional actions and judgment are called into question, expert testimony is required.

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[6] An idiosyncratic reaction is characterized by individual hypersensitivity to a food or drug.

> Careless professional practice must not be made immune from redress at law. This is imperative for the protection of the public. That same consideration, however, dictates that no legal barriers be erected against a doctor's proceeding, in emergency or otherwise, or his judgment directs and skills permit, for saving the life or health of the patient, without fear that his professional judgment and action shall be subjected to the test of unlearned lay judgment with the guidance of professional testimony as to compliance with professional standards and practice in the community. [Id. at 142-143.]

In the instant case, plaintiff's alleges that no medical emergency existed. Yet the diagnosis of a medical emergency and assessment of a patient's competency to refuse treatment necessarily involves an exercise of professional judgment, outside the common knowledge of the lay person. Dr. Paratore, in an exercise of her professional judgment, determined that restraints were necessary to protect plaintiff's airway in the face of the life-threatening emergency which had developed. Consistent with Lince, supra, plaintiff may not rely on "unlearned lay judgment" to argue that Dr. Paratore's actions were improper and/or that no medical emergency existed. Rather, plaintiff must present expert testimony to support his claim. Yet, in response to the motion for summary disposition, plaintiff submitted only the unsworn statements of himself and Lillian Hoblak, two lay witnesses (see Exhibit 3).[7] As plaintiff has submitted no expert testimony to support this element of his claim, dismissal was proper.

Plaintiff cannot avoid the necessity for expert testimony to support his claim simply by relying on his personal knowledge regarding his condition. The Court of Appeals has held that a lay witness may not testify as to his own medical condition if such testimony involves medical questions beyond the scope of lay knowledge. In Leavesly v Detroit, Dep't of Street Railways, 96 Mich App 92; 292 NW2d 491 (1980), *modified on other grounds*, 409 Mich 926 (1980), the plaintiff filed a negligence action against the defendant after he was injured in a fall from a city bus. The plaintiff's case consisted solely of the testimony of the plaintiff. In describing his injuries, the plaintiff testified that he fractured his rib and the third vertebrate in his back. The Court of Appeals held that such

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[7] Plaintiff has not alleged that either himself or Ms. Hoblak is qualified to testify as an expert witness in this case.

testimony was improper as it involves medical knowledge beyond that of ordinary persons.

> Whether or not one has suffered a fractured vertebra is certainly a question which involves medical knowledge beyond that of ordinary unprofessional persons. MRE 601. This conclusion is especially warranted here in light of the fact that there was absolutely no other evidence, expert or not, beyond that assertion by plaintiff to substantiate his claimed injuries. [Id. at 94.]

See also Howard v Feld, 100 Mich App 271; 298 NW2d 722 (1980) (plaintiff not qualified to testify that his hip operation was necessitated by the assault of the defendants rather than a prior automobile accident).

Here, the development of a medical emergency, its affect on the patient's competency and the appropriate treatment of that emergency also involves "medical knowledge beyond that of ordinary unprofessional persons." As plaintiff has presented no expert testimony to support his claims that no medical emergency existed requiring the use of restraints, defendant is entitled to dismissal of his claim.

C. Plaintiff consented to the use of treatment which was necessary or advisable to preserve his life when a life threatening emergency developed.

1. Plaintiff expressly consented to life saving treatment.

In the instant case, where plaintiff had developed a life-threatening emergency condition, the treating physician has the right and the duty to administer life-saving treatment. Upon his admission to defendant hospital, plaintiff signed an authorization permitting treatment under just such circumstances (see Exhibit 1-B, ¶2). In pertinent part, the authorization signed by plaintiff states:

> CONSENT UNDER EMERGENCY SITUATIONS
> I understand that in EMERGENCY SITUATIONS it may be necessary or advisable for the physicians to perform other additional or extended services beyond those planned at the time of admission in order to preserve my life or health. **I consent to these services and/or procedures.** [Emphasis supplied]

Thus, the use of soft wrist restraints cannot be considered a "false" restraint. As part of the treatment which, in the attending physician's expert opinion was medically necessary or advisable to preserve plaintiff's life and health in an emergency situation, this was precisely the type of

treatment plaintiff consented to.

In this case, plaintiff's treating physician believed that soft wrist restraints were necessary to protect plaintiff's life. Specifically, Dr. Paratore's affidavit provides:

> As a result of the Compazine reaction and the treatment thereof, Mr. Tate developed respiratory difficulty characterized by a drop in his respiration rate.
>
> As a result of a drop in his respiration rate, the decision was made to intubate Mr. Tate to protect his airway in the event he suffered a respiratory arrest. Intubation is the insertion of a small-caliber tube into the airway to secure it for oxygen administration. In the event a patient stops breathing or cannot breath [sic] adequately to profuse his heart, an intubation tube is a life-line to allow administration of oxygen. The intubation in this matter was placed nasally.
>
> Per protocol, and because of his dystonic reaction, Mr. Tate was placed in soft wrist restraints to prevent him from extubating himself whereby causing injury to his airway and jeopardizing his airway. [Exhibit 2, ¶¶7-9.]

Thus, as plaintiff authorized defendant to use emergency treatment necessary or advisable to preserve his life, where his treating physician believed it necessary and advisable to use soft wrist restraints to protect plaintiff from injuring his airway and jeopardizing his life, plaintiff expressly consented to the use of such restraints.

2. Plaintiff's consent to life saving treatment can be implied.

Even if plaintiff's specific consent to such emergency treatment is disregarded, this Court has long recognized that where a life threatening emergency exists, consent to treatment is presumed. In Delahunt v Finton, 244 Mich 226; 221 NW 168 (1928), the plaintiff had agreed to allow the defendant to perform an examination upon him to diagnose his condition. The plaintiff was placed under anesthetic and the defendant inserted an instrument into his bladder. The instrument looped into the bladder and could not be withdrawn. The defendant then operated on the plaintiff in order to remove the instrument. The plaintiff sued claiming, in part, that he had not consented to the removal operation. The Delahunt Court held that when an emergency situation develops, a physician has a duty to administer necessary treatment.

> It is settled that a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, in cases of emergency, without the consent of the patient. In so doing, he is not liable for an honest error in judgment. [Id. at 229, citations omitted.]

Notably, the Delahunt Court specifically referred to "cases of emergency" and did not limit its holding to only those situations where the patient is unconscious.

In the more recent decision of Werth v Taylor, 190 Mich App 141, 150; 475 NW2d 426 (1991), wherein the plaintiff alleged, in part, the intentional tort of assault and battery, the Court of Appeals held that it is only the "patient's fully informed, contemporaneous decision which alone is sufficient to override evidence of medical necessity." In the Werth case, the plaintiff was admitted to the defendant hospital to give birth to twins. The plaintiff was a Jehovah's Witness who was thus opposed to blood transfusions. Prior to her admission, both the plaintiff and her husband signed forms refusing blood transfusions. After the delivery, the plaintiff was found to be bleeding from the uterus. Her treating doctor recommended a D & C procedure and again discussed with the plaintiff and her husband their opposition to blood transfusions. During the procedure, the anesthesiologist observed symptoms in the plaintiff including mottling and cooling of the skin, premature ventricular activity, oozing of crystalloid material from her eyes and a rapid and significant fall in the plaintiff's blood pressure. The anesthesiologist determined that a blood transfusion was necessary to save the plaintiff's life. Although the anesthesiologist was informed that the plaintiff was a Jehovah's Witness, the transfusion was nevertheless given.

The plaintiff in Werth thereafter filed a medical malpractice action and also alleged an assault and battery against the anesthesiologist, premised on the anesthesiologist's administration of a blood transfusion in contravention of the plaintiff's express refusal of such treatment. This Court held that summary disposition of the assault and battery claim was proper as the refusals of treatment (i.e. refusal of blood transfusions) by the plaintiff and her husband were not made "when her life was hanging in the balance or when it appeared that death might be a possibility if a transfusion were not given." Id. at 150. Thus, where the plaintiff's refusal of a blood transfusion was not made with the understanding that death could result if such treatment were withheld, her refusal was not

contemporaneous or informed. The Werth Court also held that the fact that the defendant did not attempt to obtain consent from the plaintiff's husband, who was awake and available, did not preclude summary disposition. Id. at 150.

Similarly, in the instant case, plaintiff's alleged refusal of treatment was not made with the full understanding that death could result if treatment were not administered. Dr. Paratore testified that plaintiff's dystonic reaction compromised his alertness and mental competency. Specifically, Dr. Paratore's affidavit provides:

> Because of the Compazine reaction and the reaction to the treatment thereof, Mr. Tate developed an emergent condition which was life-threatening and mandated immediate care and treatment. Because of the dystonic reaction, Mr. Tate would not have been sufficiently alert or sufficiently mentally competent to refuse treatment. [Exhibit 2, ¶11.]

Thus, where plaintiff's reaction to the medication rendered him unable to express a fully informed, contemporaneous refusal of treatment, his consent to life saving treatment must be implied. As plaintiff did not recognize that he had developed a life threatening medical condition, any refusal of medical treatment by plaintiff was not made with the understanding that death might be a possibility if treatment were withheld.

3. Plaintiff's "informed consent" rights were not abridged by the administration of treatment necessary to preserve his life.

The Court of Appeals relied, in part, on this Court's decision in In re Martin, 450 Mich 204; 538 NW2d 399 (1995), to conclude that a question of fact was presented regarding whether plaintiff was competent to refuse treatment. Yet the Martin case actually supports dismissal of this action, as this Court concluded that life-sustaining treatment could be withdrawn only if clear and convincing evidence established that the patient, while still competent, clearly intended to have such treatment withdrawn.

In Martin, this Court considered whether life-sustaining treatment should be withdrawn from a conscious patient who suffered from a mixture of cognitive and communicative impairments that made it impossible to evaluate the extent of his cognitive deficits. Based on the patient's pre-injury

statements that he did not wish to live in a "vegetative" state, the petitioner requested that nutritive support be withdrawn.

The Martin case presented a fairly unique factual scenario. The petitioner and Martin were married with three children. Martin suffered severe injuries in an automobile accident which impaired his physical and cognitive abilities, left him unable to walk or talk, and rendered him dependent on a colostomy for defecation and a gastrostomy tube for nutrition. The petitioner filed a petition requesting authorization to withdraw Martin's nutrition support. The petitioner and several of his co-workers testified that Martin had repeatedly stated before his accident that he would not want to continue living in a vegetative state, dependent on machines. The petition was opposed by Martin's mother and sister. The Court held that, despite Martin's previously expressed wishes that he not be kept alive in a "vegetative" state, in this instance, the Court would not authorize the withdrawal of life-sustaining treatment. The Court indicated that Martin's previously expressed wishes to refuse treatment did not contemplate the precise condition in which he found himself. That is, he was not in what would typically be considered a vegetative state. Rather, he was conscious, not in any visible pain or discomfort and there was some debate as to the extent of his cognitive disabilities.

The Martin Court noted that its decision did not abridge Martin's right to refuse life-sustaining treatment (i.e. his informed consent rights). In the absence of clear and convincing evidence that, prior to his accident, Martin intended to refuse life-sustaining treatment under the present circumstances he found himself in, the life-sustaining treatment must continue. The Court noted that "if we are to err, we must err in preserving life." Id. at 225.

In the instant case, plaintiff contends that he had the right to decline life-saving treatment, yet at the same time, plaintiff's complaint is premised on the theory that no medical emergency existed necessitating life saving treatment. Dr. Paratore's affidavit and the medical records generated from plaintiff's visit to defendant hospital, both of which are uncontradicted by any expert testimony submitted on behalf of plaintiff, clearly demonstrate that a medical emergency in fact existed.

Further, the records demonstrate that plaintiff requested to leave the hospital after the medication Compazine was administered intravenously, which medication precipitated the medical emergency. Plaintiff has presented no expert testimony to contradict this fact. Further, plaintiff's own complaint allegations state that he attempted to leave after an IV was started. The IV was the method by which the Compazine was administered to treat plaintiff's nausea. The administration of the Compazine precipitated the emergency condition which threatened plaintiff's life and compromised his competency. In the professional opinion of plaintiff's treating physician, it was from this point on that plaintiff was insufficiently alert or competent to refuse treatment. There is no evidence, much less clear and convincing evidence, that plaintiff in this case expressed a wish to have treatment withdrawn while still competent (i.e. before the Compazine was administered) or that a dystonic reaction to Compazine could not affect a patient's competency.

Dr. Paratore's affidavit establishes that after the Compazine was administered and plaintiff's dystonic reaction began, plaintiff did not comprehend the gravity of his condition, nor could plaintiff comprehend that the use of soft wrist restraints was necessary to protect and preserve his life, as his reaction to the medication compromised his alertness and mental competency (Exhibit 1, ¶11). Consistent with the Martin decision, as well as Werth, supra, a refusal of life-sustaining treatment is effective only if the patient understands the particular circumstances of his condition and then knowingly declines treatment. As is Martin, there is no evidence that plaintiff understood his particular circumstances (i.e. that his life was in jeopardy due to a possible respiratory arrest) such that he was competent to refuse the treatment, which his treating physician testified was necessary to preserve his life.[8]

Thus, as plaintiff expressly consented to additional procedures which were necessary or advisable to preserve his life, summary disposition as to his false imprisonment claim was appropriate as the use of soft wrist restraints as a component of that life-saving treatment cannot be

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[8] Even if plaintiff's unsworn statements are considered by this Court, such statements actually demonstrate that, like the patient in Martin, supra, plaintiff did not understand the circumstances in which he found himself.

considered "false." Further, plaintiff's claimed withdrawal of his consent to treatment was ineffective. Such withdrawal of consent occurred after the medication Compazine had voluntarily been administered intravenously and plaintiff had suffered an adverse reaction. Insofar as plaintiff's alertness and mental competency had thus been compromised, he did not comprehend that a life threatening medical emergency existed. Any refusal of treatment was neither contemporaneous nor fully informed to a degree sufficient to override the presumption of consent in a medical emergency. The unrebutted medical evidence and expert testimony demonstrates that plaintiff was in very real danger of respiratory arrest and death. Plaintiff's alleged refusal of what he considered to be unnecessary treatment cannot be considered a fully informed, contemporaneous refusal of life saving treatment. In the alternative, plaintiff's consent to the procedures must be implied where his medical condition compromised his mental alertness, competency and ability to decline treatment.

D. Plaintiff failed to comply with the court rules and thus, in effect, failed to submit any evidence to rebut defendant's motion for summary disposition.

1. Plaintiff's unsworn statements do not qualify as proper affidavits.

Before the trial court, plaintiff submitted two typewritten statements with his response to defendant's motion for summary disposition (see Exhibit 3). Neither plaintiff's own statement, entitled "Plaintiff's Donald Tate's Affidavit" nor the statement purportedly signed by his friend, entitled "Lillian Hoblak's Deposition," contains any indication that the contents of either statement had been confirmed by oath or affirmation before a person duly authorized to issue an oath or affirmation. As such, neither statement constitutes a proper affidavit. In Holmes v Michigan Capital Medical Center, 242 Mich App 703; 620 NW2d 319 (2000), this Court concluded that an affidavit lacking a jurat was not a proper affidavit.

> To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. [Id. at 711.]

See also MCR 2.113(A)("[A]n affidavit must be verified by oath or affirmation.")

Thus, lacking confirmation by oath or affirmation, plaintiff's statements cannot qualify as valid affidavits.

2. The trial court properly disregarded plaintiff's unsworn statements where summary disposition was premised on MCR 2.116(C)(10).

Where a party bases its motion for summary disposition on MCR 2.116(C)(10), that party is required, pursuant to MCR 2.116(G)(3), to submit "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion." In this case, defendant submitted with its motion for summary disposition, plaintiff's medical records from his stay at defendant's facility, plaintiff's signed "Authorization for Emergency Services" and the affidavit of Diane Paratore, D.O., which supported the argument that necessary medical treatment was administered to plaintiff in the face of a life threatening emergency and that plaintiff consented to such treatment.[9] Thus, defendant fulfilled its obligation to support its summary disposition motion as required by the court rules.

In response to a motion for summary disposition based on MCR 2.116(C)(10), an opposing party may not simply rely on the pleadings as a denial of the arguments raised in the motion. Rather, the opposing party is required to set forth specific facts, by affidavit or otherwise, showing that a genuine issue of fact exists. In pertinent part, MCR 2.116(G)(4) provides:

> When a motion under subrule (C)(10) is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial**. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis supplied.]

In the instant case, in response to defendant's motion for summary disposition under MCR 2.116(C)(10), plaintiff failed to respond with proper affidavits or any other evidence to establish that a genuine issue of fact existed, as required by court rule. Rather, in response to defendant's motion,

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[9] Plaintiff does not appear to challenge the authenticity of the medical records or his signed authorization for emergency services.

plaintiff submitted two unsworn statements which, consistent with case law and court rule, cannot constitute proper affidavits.

Yet, in concluding that a question of fact existed regarding whether plaintiff was competent to refuse this treatment, the Court of Appeals improperly relied on averments purportedly made by plaintiff and his friend, Lillian Hoblak, in these unsworn statements. However, these averments, in the form of typewritten statements, and extensively referenced in the Court of Appeals' opinion, were not notarized or otherwise administered under oath. The statements cannot qualify as proper affidavits and, thus, cannot form the basis for a conclusion that a material question of fact exists to defeat summary disposition. In Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999), this Court considered the evidentiary standard required to survive summary disposition and held that "the content or substance of the evidence proffered must be admissible in evidence." The Court noted that such was consistent with the requirement that the opposing party demonstrate that a genuine issue of material fact exists.

> Demanding that evidence be substantively admissible is consistent with MCR 2.116(G)(4), which requires that an adverse party "set forth specific facts showing that there is a genuine issue for trial." By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled. The nonmovant is not *showing* that a genuine issue exists. Permitting inadmissible evidence to suffice in opposing summary disposition would require less than the pre-1985 court rule and create illusory fact issues. [Id. at 123, n 5, emphasis in original.]

In the instant case, as noted, in response to defendant's summary disposition motion, plaintiff submitted two **unsworn** statements, from himself and his friend, Ms. Hoblak (see Exhibit 3). As such, these statements fall squarely within the definition of hearsay, as set forth, in pertinent part, by MRE 801:

> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the

declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

Plaintiff's and Ms. Hoblak's written statements are hearsay which does not fall within any exception to the general rule proscribing the use of hearsay, and are, thus, inadmissible. MRE 802 specifically provides that "[h]earsay is not admissible except as provided by these rules."

After summary disposition was granted by the trial court, with his motion for reconsideration before the trial court, plaintiff then submitted a short excerpt from his deposition testimony. While defendant maintains that this evidence was improperly before the trial court as it was submitted for the first time with a motion for reconsideration,[10] nevertheless, there is no testimony in the deposition excerpt which contradicts Dr. Paratore's affidavit and the evidence contained in plaintiff's medical records. The excerpt from plaintiff's testimony does not address the crucial questions, specifically, whether plaintiff was restrained before or after the medications were administered and plaintiff suffered an adverse reaction which compromised his alertness and competency. As to these central issues, the only admissible evidence submitted, which the trial court could properly consider, was the affidavit of Dr. Paratore and plaintiff's medical records. Plaintiff submitted no evidence and no expert testimony to counter the evidence submitted by defendant that an emergent condition developed which was life threatening, that this condition required emergency treatment and that plaintiff was at that time not sufficiently alert or competent to refuse such treatment.

The instant case presents an issue similar to that considered by this Court in Perkovic v Brown, ___ Mich ___; 670 NW2d 670 (2003), reversing the Court of Appeals' decision in the same case, unpublished opinion per curiam of the Court of Appeals, decided Nov. 15, 2002 (Docket No. 235699) (unpublished opinion and Supreme Court order attached as Exhibit 8). In Perkovic, the action arose out of an automobile accident occurring at an intersection. The plaintiff was struck by the defendant as the plaintiff was completing a left turn. The trial court granted summary disposition to the defendant, finding that the plaintiff was more than fifty percent at fault. The Court of Appeals

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[10] See Maiden, supra, at 126, n 9 and Quinto, supra, at 366, n 5.

reversed, finding that, where the defendant's negligence could not be determined from the record, due to a lack of evidence, the trial court erred in granting summary disposition. The Supreme Court reversed and reinstated the trial court's order, finding that, where the defendant's negligence could not be determined, summary disposition was in fact proper.

So too, here, the only evidence submitted to the trial court was that an emergency situation developed which required immediate treatment and that plaintiff's alertness and competency were compromised. The Court of Appeals in its opinion relied exclusively on unsworn statements to determine that a question of fact was presented. Yet as such evidence was indisputably inadmissible, in effect, no evidence was submitted by plaintiff to rebut the motion for summary disposition. Under such circumstances, plaintiff failed to raise a question of fact and defendant was entitled to summary disposition.

Plaintiff, in effect, filed no documentation, no affidavits, and no evidence to support his response to the summary disposition motion. Thus, defendant was entitled to dismissal of plaintiff's claim.

Conclusion

In this case, plaintiff presented to Botsford Hospital with complaints of an upset stomach and nausea. It is undisputed that plaintiff was administered Compazine intravenously to treat this condition. The evidence submitted by defendant establishes that plaintiff immediately developed a severe adverse reaction to this medication, characterized by dystonia and a compromise of his alertness and competency. The treating physician at that time determined that emergency procedures were necessary to preserve plaintiff's life and that, in the midst of his dystonia, he was not competent to refuse such treatment. The emergency procedures included the brief use of soft wrist restraints.

Plaintiff has submitted no evidence and no expert testimony to counter that of the treating physician. Plaintiff submitted only unsworn statements indicating that he and his friend believed no medical emergency existed. The Court of Appeals erroneously relied on these unsworn statements to conclude that a question of fact existed regarding plaintiff's competency to refuse treatment. Yet as this Court has concluded, in cases of emergency, a physician must perform such procedures as are necessary and is not liable for an "honest error in judgment." See Delahunt, supra, at 229. To defeat a properly supported summary disposition motion, plaintiff was required to provide some expert testimony to support an argument that a dystonic reaction cannot occur with the administration of Compazine and/or that such a reaction does not affect a patient's competency to decline treatment. Yet plaintiff provided only inadmissible hearsay, purportedly from lay witnesses, to respond to defendant's properly supported motion for summary disposition. Such is insufficient to counter the evidence supplied by defendants and summary disposition was properly granted by the trial court.

RELIEF REQUESTED

WHEREFORE, defendant-appellant, BOTSFORD GENERAL HOSPITAL, a Michigan non-profit corporation respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals decision reversing the trial court's grant of defendant's motion for summary disposition. In the alternative, defendant requests that this Honorable Court grant its application for leave to appeal. Finally, defendant requests costs and attorney fees.

Respectfully submitted,

TANOURY, CORBET, SHAW,
NAUTS & ESSAD, P.L.L.C.

By: _____

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Dated: July 21, 2004

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Court of Appeals, State of Michigan

ORDER

Donald E. Tate v Botsford General Hospital

Docket No. 245081

LC No. 01-035359-NO

Jessica R. Cooper
Presiding Judge

Richard Allen Griffin

Stephen L. Borrello
Judges

The Court orders that the motion for reconsideration is DENIED.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 10 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DONALD E. TATE,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
April 29, 2004

No. 245081
Oakland Circuit Court
LC No. 01-035359-NO

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

In this false imprisonment action, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff, aged seventy, drove himself to defendant Botsford General Hospital because he was experiencing an upset stomach and became nauseous. Plaintiff's friend, Lillian Hoblak, accompanied him to the hospital. Plaintiff acknowledged that he signed an Authorization for Emergency Services form and consented to have his blood pressure taken. He also stated that an intravenous (IV) line was inserted in his arm. Plaintiff's complaint alleges that plaintiff did not believe that the emergency room physician knew what she was doing, "so he advised her that he was leaving as he wanted to go to Beaumont Hospital for treatment, but was told by the attending doctor that he was not well enough to leave." Plaintiff alleges that when he attempted to get up and leave, he was restrained with wrist restraints, placed on a ventilator tube, and treated. According to the affidavit of the emergency room physician, plaintiff was given Compazine for nausea and suffered a potentially life-threatening allergic reaction to the drug. The physician further averred that as a result of his reaction to Compazine, plaintiff needed emergency care and was not sufficiently alert or mentally competent to refuse treatment.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the emergency room physician had a right and duty to provide care in an emergency situation. Following a hearing, the trial court found that plaintiff had been restrained, that he developed an emergency condition that was life threatening and mandated immediate care and treatment, and that his consent to treatment was presumed. It therefore granted defendant's motion for summary disposition.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Allstate Ins Co v Dep't of Management & Budget,* 259 Mich App 705, 710; 675 NW2d 857 (2003). "In cases involving questions of intent, credibility, or state of mind, summary disposition is hardly ever appropriate." *Michigan Nat'l Bank-Oakland v Wheeling,* 165 Mich App 738, 744-745; 419 NW2d 746 (1988).

As an initial matter, we note that while many of defendant's arguments are based on principles applicable to medical malpractice actions, this is not a medical malpractice case; it is an action for false imprisonment. The elements of false imprisonment are "'(1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement.'" *Moore v Detroit,* 252 Mich App 384, 387; 652 NW2d 688 (2002), quoting *Adams v Nat'l Bank of Detroit,* 444 Mich 329, 341 n 21; 508 NW2d 464 (1993). The essence of a claim of false imprisonment is that the imprisonment is false – done without right or authority. *Id.* at 388.

In granting summary disposition for defendant, the trial court relied on *Delahunt v Finton,* 244 Mich 226; 221 NW 168 (1928), which involved the presumptive consent of an unconscious patient in a medical emergency. In this case, however, there is no dispute that plaintiff was conscious at all pertinent times.

"[A] competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment." *In re Rosebush,* 195 Mich App 675, 681; 491 NW2d 633 (1992); see also *In re Martin,* 450 Mich 204, 216-217; 538 NW2d 399 (1995) (a patient has the right to refuse life-sustaining treatment), and MCL 333.20201(2)(f).[1]

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[1] MCL 333.20201(2)(f) provides that a hospital's policy describing the rights and responsibilities of patients shall include, as a minimum:

> A patient or resident is entitled to refuse treatment to the extent provided by law and to be informed of the consequences of that refusal. When a refusal of treatment prevents a health facility or its staff from providing appropriate care according to ethical and professional standards, the relationship with the patient or resident may be terminated upon reasonable notice.

Although it is not settled whether the right to refuse medical treatment is constitutional, common law, or statutory, "the evidentiary and decision-making standard appropriate in a given case do not depend on the source of the right." *In re Martin,* 450 Mich 204, 215-216; 538 NW2d 399 (1955).

Where a competent patient makes and communicates the choice to refuse treatment, he does not lose the right to make a choice because of his later incompetency or inability to communicate. *In re Martin*, *supra* at 217-218.

In this case, there is no dispute that plaintiff was competent and alert when he arrived at the hospital. If competent, he had the right to refuse treatment, regardless whether the physician believed that he needed care. *Id.* There is little information in the record regarding whether plaintiff was informed of his condition or treatment choices, and there is conflicting evidence regarding his competence and ability to make medical care decisions while at the emergency room. In her affidavit, the treating physician stated that plaintiff "initially" wanted to leave the hospital. Plaintiff averred that it was "only after" he was "tied down and the IV tube reinserted and [had] drugs poured into" him that he suffered a "bad reaction." Plaintiff's friend, Ms. Hoblak, averred that she heard plaintiff say that he was leaving the hospital "and going to Beaumont," and that, even after plaintiff was restrained and an IV was inserted, he appeared "fully able, had he not been bound, to get up and leave and to drive over to Beaumont Hospital." Both plaintiff and Hoblak reported that plaintiff threatened to call the police and that the treating physician responded (apparently referring to a security guard) that "this was the police." Plaintiff left the hospital against medical advice at 6:46 a.m. the following morning. Because a question of fact exists regarding whether plaintiff was competent to refuse treatment, summary disposition was improper.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DONALD E. TATE,

Plaintiff,

v

Case No. 01-035359-NO
Hon. Colleen A. O'Brien

BOTSFORD GENERAL HOSPITAL,
a Michigan non-profit corporation,

Defendant.
_____/

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_____/

OPINION AND ORDER

This matter is before the Court on Plaintiff's motion for reconsideration of this Court's order granting Defendant's motion for summary disposition. Pursuant to MCR 2.119(F)(2), the Court dispenses with oral argument.

A motion for reconsideration must demonstrate a "palpable error" by which the Court and the parties have been misled. A motion that merely presents the same issues as ruled upon by the Court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3). The grant or denial of a

motion for reconsideration is a matter within the discretion of the trial court. Cason v Auto Owners, 181 Mich App 600, 605 (1989).

Upon review of the motion, this Court finds that Plaintiff has failed to demonstrate a palpable error by which this Court and the parties have been misled. The Plaintiff's motion merely presents the same issues as ruled upon previously by this Court either expressly or by reasonable implication.

THEREFORE, Plaintiff's motion is DENIED.

IT IS SO ORDERED.

OCT 31 2002

COLLEEN A. O'BRIEN

Dated: _____

Hon. Colleen A. O'Brien

A TRUE COPY
WILLIAM CADDELL
County Clerk Register of Deeds
Deputy

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DONALD E. TATE,

Plaintiff,

v

Case No. 01-035359-NO
Hon. Colleen A. O'Brien

BOTSFORD GENERAL HOSPITAL,
a Michigan non-profit corporation,

Defendant.
_____/

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_____/

OPINION AND ORDER

This matter is before the Court on Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). The Court heard oral argument and took the matter under advisement.

This is a false imprisonment action. On October 12, 2001, Plaintiff Donald Tate allegedly began experiencing lower bowl cramping, which was not relieved by over-the-counter medication. Plaintiff then went to the emergency room of Defendant Botsford Hospital. The hospital records indicate that Plaintiff

complained of nausea and was short of breath. Plaintiff signed Defendant's Authorization for Emergency Services. Diane Paratore, D.O. was the attending emergency medicine physician at the time Plaintiff presented for treatment. Plaintiff was administered a medication called Compazine for his nausea. Plaintiff developed an allergic reaction to the Compazine and became agitated. Plaintiff experienced a dystonic reaction, which is a idiosyncratic drug reaction that involves acute involuntary muyscle movements and spasms. Plaintiff began pulling off his EKG leads and stated he was going home. Plaintiff was treated with Benadryl and Ativan. When Plaintiff's respiration dropped, he was intubated. Plaintiff continued in his attempts to leave. Plaintiff was then placed in wrist restraints. Plaintiff responded to the intubation. He was admitted to the hospital as an in-patient. Plaintiff signed himself out against medical advice the next morning.

Plaintiff filed suit alleging false imprisonment on the basis that when he attempted to get-up and leave the hospital, he was restrained on his gurney and intubated against his will and held captive in Defendant hospital.

In his affidavit, Plaintiff contends there was no medical emergency or life threatening condition. He contends that he was fully, mentally alert and was capable of driving himself over to another hospital.

Defendant's motion is brought pursuant to MCR 2.116(C)(8) and (10). This Court has reviewed this matter pursuant to MCR 2.116(10), having gone outside the pleadings. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. Spiek v Dep't of Transportation,

456 Mich. 331, 337 (1998). When deciding the motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. Ritchie-Gamester v Berkley, 461 Mich 73, 76 (1999). The moving party has the initial burden of supporting its position with documentary evidence, and the party opposing the motion then has the burden of showing that a genuine issue of fact exists. Smith v Globe Life Ins Co, 460 Mich 446, 455 (1999). The nonmoving party may not rest on mere allegations or denials but must set forth specific facts--through documentary evidence--showing that a genuine issue of fact exists. Karbel v Comerica Bank, 247 Mich App 90, 97 (2001).

Defendant argues that because Dr. Paratore had the legal right to retain Plaintiff for care and treatment in light of his Compazine reaction, there was no unlawful detainment as a matter of law. Therefore, Plaintiff's claim of false imprisonment should be dismissed. This Court agrees.

In Michigan, the elements of false imprisonment are:

1. Restraint of a person's liberty or freedom of movement;

2. The restraint must be "false", that is, without right or authority to do so. [Tumbarella v The Kroger Co, 85 Mich App 482 (1978)]

Here, there is no dispute that Plaintiff was restrained. Therefore, the first element is met.

Plaintiff claims that when he was tied down and physically restrained against his will, he was mentally alert and physically able to leave the hospital. However, Plaintiff has failed to demonstrate that the restraint imposed upon him was false in view of the medical emergency presented by Plaintiff's allergic

reaction to the Compazine and the resulting drop in his respiration. In her affidavit, Dr. Paratore contends that because of the Compazine reaction and the reaction to the treatment thereof, Plaintiff developed an emergency condition which was life-threatening and mandated immediate care and treatment. Under Michigan law, in an emergency situation, consent is presumed and treatment by a physician is mandated. Delahunt v Finton, 244 Mich 226 (1928).

Accordingly, Defendant's motion is GRANTED. Plaintiff's complaint is dismissed.

IT IS SO ORDERED.

This order resolves the last pending claim and closes the case.

Dated: OCT 0 9 2002

COLLEEN A. O'BRIEN

Hon. Colleen A. O'Brien

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk Register of Deeds
J. Edens
Deputy